(1)

84- 989

No.

Supreme Court, U.S.
FILED
DEC 17 1984
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NEWSPAPER DRIVERS AND HANDLERS, LOCAL NO. 372,
a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

OAKLAND PRESS COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

GERRY M. MILLER
788 North Jefferson Street
Milwaukee, Wisconsin 53202
414/271-4500
Attorney for Petitioner

Of Counsel:
LARRY R. STEFFES
GOLDBERG, PREVIANT, UELMEN,
GRATZ, MILLER & BRUEGGEMAN, S.C.
788 North Jefferson Street
Box 92099
Milwaukee, Wisconsin 53202
414/271-4500

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

30 PP

QUESTION PRESENTED

Are district managers who oversee and recruit newspaper carriers "supervisors" excluded from collective bargaining rights under §2(11) of the Act because the carriers, who are mostly 12 year old children earning $2.00 per hour and working after school for five hours per week for no more than six months to a year, cannot on policy grounds be deemed non-employees under §2(3) of the statute and because, despite the newspaper's past treatment of them as independent contractors and the certification of a collective bargaining representative for the district managers based on that characterization, the carriers are not acutally independent contractors based solely on close scrutiny of the degree of control exercised over their work?

PARTIES

Petitioner Newspaper Drivers and Handlers Local Union No. 372, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Petitioner" or "Union") is a labor organization within the meaning of Section 2(5) of the Act, 29 U.S.C. §152(5).

Respondent National Labor Relations Board ("NLRB" or "Board") is an agency of the United States established under Section 3(a) of the Act, 29 U.S.C. §153(a).

Respondent Oakland Press Company, a subsidiary of Capital Cities Communications, Inc. ("Employer" or "Company"), is engaged in the business of publishing and printing a daily newspaper of general circulation in Oakland County, Michigan. It is an employer engaged in interstate commerce within the meaning of Section 2(2), (6) and (7) of the Act, 29 U.S.C. §152(2), (6) and (7).

TABLE OF CONTENTS

	Page
Question Presented	i
Parties	ii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Statutory Provisions Involved	3
Statement Of The Case	3
A. Factual Background	3
B. Course of Proceedings	5
Reasons For Granting The Writ:	
A. District Managers Are Not Supervisors Without Bargaining Rights Under The Act Because, As The Board Correctly Determined In Its Initial Decision, The Carriers They Recruit And Oversee Are Not Employees Within The Meaning Of The Act	8
1. This Court's Holding In *United Insurance* Does Not Preclude The Implicit Exclusion Of The Carriers From The Purview Of §2(3) On The Basis Of Legislative Purpose	10
2. The Sixth Circuit's Initial Decision Improperly Barred The Board From Applying Established Precedent Dictated By Important Considerations Of Industrial Stability To The Issues Here	17

B. Because The Rulings Below Threaten Industrial Stability By Permitting Virtually Any Newspaper Whose Circulation District Managers Have Union Representation To Put At Risk Or Hold Hostage The Collective Bargaining Relationship, Special And Important Reasons Warrant Grant Of The Writ In This Case 21

Conclusion 23

TABLE OF AUTHORITIES

Cases:

Ace Doran Hauling & Rigging Co. v. NLRB, 462 F.2d 190 (6th Cir. 1972) 16

Allied Chemical & Alkali Workers, Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971) 16

Beasley v. Food Fair, Inc., 416 U.S. 653 (1974) 21

Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327 (1967) ... 7

Buffalo Couriers Express, Inc., 129 NLRB 932 (1960) .. 17

Cedars-Sinai Medical Center, 223 NLRB 251 (1976) 12

Eureka Newspapers, Inc., 154 NLRB 1181 (1965) 17

Firmat Mfg. Corp., 255 NLRB 1213 (1981) 11

Hamilton-Brown Shoe Co. v. Wolf Bros., 240 U.S. 251 (1916) 7

Hawkes v. Internal Revenue Service, 507 F.2d 481 (6th Cir. 1974) 9

Kansas City Star Co., 76 NLRB 384 (1948)..... 17

Key Opportunities, Inc., 265 NLRB 1371 (1982) 9, 11

Mercer v. Theriot, 377 U.S. 152 (1964) 7

NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974) . . 9, 11, 13, 18

NLRB v. Hearst Publications, 322 U.S. 111 (1944) . . . 13, 15, 16

NLRB v. Hendricks County Rural Electric Membership Corp., 454 U.S. 170 (1981) 9, 11, 13, 18

NLRB v. News Syndicate Co., 365 U.S. 695 (1961) 21

NLRB v. United Insurance Co., 390 U.S. 254 (1968) . . 9, 10, 12, 13, 14, 15, 17

Newsday, Inc., 171 NLRB 1456 (1968) 17, 19

Newspaper Drivers and Handlers Local Union No. 372 v. NLRB, 682 F.2d 116 (6th Cir. 1982) (per curiam) 2, 7, 19

Newspaper Drivers and Handlers Local No. 372 v. NLRB, 735 F.2d 969 (6th Cir. 1984) 2, 7, 9

Oakland Press Co., 229 NLRB 476 (1977) 2, 5

Oakland Press Co., 249 NLRB 1081 (1980) 2, 6

Oakland Press Co., 266 NLRB 107 (1983) 2, 7

Oakland Press Co. v. NLRB, 606 F.2d 689 (6th Cir. 1979) 2, 6, 10

Philadelphia Newspapers, Inc., 238 NLRB 835 (1978) . . 20

Ray Brooks v. NLRB, 348 U.S. 96 (1954) 21

San Antonio Light, 130 NLRB 619 (1961) 17

San Francisco Art Inst., 226 NLRB 1251 (1976) 9, 11, 12

Seafarers Local 777 v. NLRB, 603 F.2d 862 (D.C. Cir. 1979) 19

Suburban Newspaper Group, 195 NLRB 438 (1972) 17

United States Gypsum Co., 157 NLRB 652 (1966) 21

The Virginian Pilot/Ledger Star, Capital Division of Landmark Communications Inc., 241 NLRB 575 (1979) 20

Statutes:

28 U.S.C. § 1254(1) 3

29 U.S.C. § 151 *et seq.* 3

29 U.S.C. § 151 8

29 U.S.C. § 152(2) ii

29 U.S.C. § 152(3) ..... i, ii, 3, 10, 11, 12, 13, 15, 16

29 U.S.C. § 152(5) ii

29 U.S.C. § 152(6) ii

29 U.S.C. § 152(7) ii

29 U.S.C. § 152(11) ..... i, 3, 11

29 U.S.C. § 153(a) ii

29 U.S.C. § 158(a)(5) 5

29 U.S.C. § 160(f) 7

29 U.S.C. § 164(a) 21

29 U.S.C. § 1053 21

Other Authorities:

H.R. Rep. No. 245, 80th Cong., 1st Sess. 18 (1947) 15, 16

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NEWSPAPER DRIVERS AND HANDLERS, LOCAL NO. 372,
a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

OAKLAND PRESS COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To The Honorable, The Chief Justice Of The United States Supreme Court And The Associate Justices Of The Supreme Court Of The United States:

Petitioner respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The issues presented in this petition have been the subject of litigation for over seven years. An Administrative Law Judge, three panels of the Board, and three panels of the United States

Court of Appeals for the Sixth Circuit have rendered hopelessly inconsistent decisions in this case. These decisions are set out chronologically below.

The decision of the Administrative Law Judge ("ALJ") is reported as an attachment to the first decision of the NLRB at 229 NLRB 476; it is reproduced as Appendix E (A- 23-29).

The first decision and order of the NLRB, which affirmed the ALJ's decision, is reported as *The Oakland Press Co.*, 229 NLRB 476 (1977); it is reproduced as Appendix D (A- 20-21).

The first decision of the Sixth Circuit, which remanded the case to the Board, is reported as *Oakland Press Co. v. NLRB,* 606 F.2d 689 (6th Cir. 1979); it is reproduced as Appendix B (A-6-14).

A supplemental decision and order of the NLRB is reported as *The Oakland Press Co.*, 249 NLRB 1081 (1980); it is reproduced as Appendix F (A- 40-50).

The second decision of the Sixth Circuit, which remanded the case in part to the Board, is reported as *Newspaper Drivers and Handlers Local Union No. 372 v. NLRB,* 682 F.2d 116 (6th Cir. 1982); it is reproduced as Appendix C (A- 15-19).

The second supplemental decision of the NLRB is reported as *The Oakland Press Co.*, 266 NLRB 107 (1983); it is reported as Appendix G (A-51-55).

The third decision of the Sixth Circuit is reported as *Newspaper Drivers and Handlers Local No. 372 v. NLRB,* 735 F.2d 969 (6th Cir. 1984); it is reproduced as Appendix A (A-1-5).

JURISDICTION

The last decision of the court of appeals in this matter issued on May 31, 1984. A petition for rehearing, which was timely filed, was denied on August 15, 1984. By order of this Court

dated November 2, 1984, the time for filing a petition for writ of certiorari was extended to and including December 17, 1984. This petition is being filed within the time period specified by that extension.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. §151, *et seq.* are set out in Appendix K (A- 60-62).

STATEMENT OF THE CASE

A. Factual Background.

The Union has been the certified bargaining representative of the Company's circulation department district managers since 1971, when it won a representation election. Beginning in 1970, the Company recognized the district managers as employees under Section 2(3) of the Act; the Company also characterized its newspaper carriers as independent contractors (A- 2).

Subsequent to certification as the district managers' bargaining representative, the Union and the Company negotiated and entered into two successive collective bargaining agreements (A-53). When the second collective bargaining agreement was about to expire, the Company reversed its earlier position and refused to bargain with the Union, asserting for the first time that the district managers were supervisors under Section 2(11) of the Act because the carriers were actually employees rather than independent contractors (A- 2).

The district manager bargaining unit consists of approximately 15 employees who are responsible for the sale, promotion and delivery of newspapers within a specific geographic area (A- 2). The collective bargaining agreements entered into between the Company and the Union on behalf of the district managers pro-

vided for employee benefits which, among other things, required weekly pension premium payments into a jointly administered pension plan. Continued contributions and eligiblity for benefits under such plans depend upon continuation of the collective bargaining relationship. The agreements also provided for job security by limiting layoffs to a strict seniority standard (A-63-64).

The majority of the Company's 1250 newspaper carriers are children of approximately 12 years of age who deliver the papers on foot, skateboard, bicycles, or horseback. They deliver on the average about 50 papers per day to customers in their neighborhoods, and make about four cents profit per paper. These children typically keep their routes for a period of six months to a year (A- 25-26). About 35 of the carriers are adults who deliver 175-200 newspapers each day by automobile in rural areas (A- 25). The carriers are directly responsible to the district managers in the Company's organizational scheme (A- 41). All carriers are required to sign the Company's "Independent Carriers Route Agreement", which grants them the exclusive right to service any and all home delivery subscribers of the newspaper on their route (A- 41). No one else in the Company's circulation department signs these or any other contracts. The accident insurance policy which the Company makes available to carriers is voluntary, essentially at the carrier's cost, and refers to the carrier as "independent contractor." (A- 43). Likewise, the Company does not consider carriers to be employees for purposes of income tax withholdings, social security, unemployment compensation or worker's compensation (A- 43).

Carrier earnings are determined by the number of papers they can sell and collect for (A- 45-46). If they order papers but cannot sell them, carriers receive no credit for returns. Carriers can extend credit to their customers, but bear the risk of any loss which results (A- 46). They hire and pay their own substitutes (A- 41). They select their method of delivery and furnish or

purchase whatever equipment they need other than the route book (A- 43). After initial recruitment, they essentially work by themselves and within broad limits arrange their own delivery, billing, and collection schedules. Carrier participation in the employer's contests and promotional campaigns is voluntary although expected (A- 42, 45). A route area will normally only be reduced at the request of a carrier although the district manager has the unilateral right to change the size (A- 46).

Except for the fact that most carriers now mail in their payment each week, rather than turning the money into the district manager, there has been no change in the working relationship between the carriers and the Company over the period since the Union was certified to represent the district managers; the ALJ found that the employer "has always treated the carriers as non-employees, and still does". (A-26, 65).

B. Course of Proceedings

The procedural history of this case dates back to May 6, 1977 when the Board issued a decision and order adopting, *inter alia,* the ALJ's finding that the newspaper carriers of the Company were not employees and that therefore the district managers were not statutory supervisors but rather employees with respect to whom the employer had refused to bargain in violation of Section 8(a)(5) of the Act. Thus the Board, in its original decision, agreed with the ALJ that the Company had "clothed [the carriers] with indicia of independent contractors", and that it had "always treated the carriers as non-employees, and still does", so that under established law it was not essential to determine whether the carriers were actually independent contractors. The Board also agreed that: "From the record as a whole, it is clear that the Respondent's [i.e. the employer's] contention that these carriers are employees is taken for the purposes of this case only." *See The Oakland Press Co.,* 229 NLRB 476 (1977) (A- 26).

The Company petitioned the United States Court of Appeals for the Sixth Circuit to review and set aside the Board's Order, and the Board filed a cross-application for enforcement of its order. On October 4, 1979, the court of appeals remanded to the Board the issue of the carriers' status, holding that they had to be classified as either employees or independent contractors. *See Oakland Press Co. v. NLRB,* 606 F.2d 689 (6th Cir. 1979) (A- 6-14).

On June 6, 1980, the Board accepted the remand and issued a supplemental decision and order in which it found that the carriers were employees and that the district managers were supervisors within the meaning of the Act. *See The Oakland Press Co.,* 249 NLRB 1081 (1980) (A- 40-50). Because it accepted the remand, the Board had to decide whether the carriers were independent contractors or employees under the Act (A- 45). In finding that the carriers were employees, the panel majority relied on indicia of control the district managers had over the carriers, the absence of a proprietary interest on the part of the carriers, and their limited opportunity for significantly increasing their income or incurring substantial losses. The panel majority, however, gave little or no weight to the employer's prior characterization of the carriers as independent contractors, noting merely that "more recent" agency decisions supported its reversal of position at this point. (A- 47). The dissenting member would have held the newspaper to its past characterization of the carrier relationship. (A- 48-50).

The Union appealed the Board's supplemental decision and order to the Court of Appeals for the Sixth Circuit. On June 29, 1982, the court affirmed the Board's order with respect to the determination that the carriers were employees under the Act; the court found that there was substantial evidence to support this determination. The court, however, did remand to the Board the determination as to whether the Company should be "equitably estopped from asserting a position completely inconsistent with its past conduct and representations". *See*

Newspaper Drivers and Handlers Local Union No. 372 v. NLRB, 682 F.2d 116 (6th Cir. 1982) (A- 15-19).

In its second supplemental decision dated February 7, 1983, the Board concluded that equitable estoppel, whereby the Company is equitably estopped from denying the employee status of its district managers and refusing to bargain collectively with the Union, was not applicable, and even if it did lie, the requisites for application of the doctrine of equitable estoppel were not present in this case. *See The Oakland Press Co.,* 266 NLRB 107 (1983) (A- 51-55).

The Union again appealed the Board's second supplemental decision and order to the United States Court of Appeals for the Sixth Circuit. On May 31, 1984, exercising its jurisdiction under Section 10(f) of the Act, 29 U.S.C. §160(f), the court below affirmed the Board's decision and order on the equitable estoppel issues. However, the Court did note in no uncertain terms its disagreement with the Board's resolution of the underlying issue in the case: that is, whether the newspaper carriers were employees and consequently whether the district managers were supervisors. *See Newspaper Drivers and Handlers Local No. 372 v. NLRB,* 735 F.2d 969, 970 n.** (6th Cir. 1984) (A- 3-4). The question raised in this petition, i.e., the issue which divides the Sixth Circuit's third panel and the Board, is now ripe for review by this Court.[1]

---

[1] In the exercise of its jurisdiction, this Court has long adhered to the policy of reviewing only final judgments, except in extraordinary situations. *Hamilton-Brown Shoe Co. v. Wolf Brothers,* 240 U.S. 251, 257-258 (1916); *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Co.,* 389 U.S. 327, 328 (1967). However, upon review of a final judgment, this Court may reach questions determined in any stage of the litigation. *Hamilton-Brown Shoe Co. v. Wolf Brothers,* 240 U.S. at 257; *Mercer v. Theriot,* 377 U.S. 152, 153, 154 (1964).

REASONS FOR GRANTING THE WRIT

A. District Managers Are Not Supervisors Without Bargaining Rights Under The Act Because, As The Board Correctly Determined In Its Initial Decision, The Carriers They Recruit And Oversee Are Not Employees Within The Meaning Of The Act.

It is the declared purpose of the federal labor statute to promote and encourage stable collective bargaining relationships as an alternative to industrial strife. See 29 U.S.C. § 151. The result in this case, however, undermines rather than promotes this purpose.

The key rulings below, i.e., that of the Sixth Circuit's first panel and the Board on remand, permit an employer to destroy an established collective bargaining relationship, as well as all of the rights that grow out of it, by the artifice of claiming that individuals it has previously treated and characterized as non-employees (the carriers) are actually employees and therefore that those who recruit and oversee them (the district managers) are supervisors without statutory collective bargaining rights. The rulings below allow this ploy even though no claim has been or could be voiced that operational changes since the beginning of the bargaining relationship warranted the change in characterization. Indeed, the rulings below sustain this claim while permitting the employer to maintain that for all purposes *except* collective bargaining the carriers are still non-employees. This bizarre holding rests on the absurd premise that unorganizable teenagers who work for several hours after school, earn $2 per day and keep the job for no more than six months to a year are, as opposed to full-time people who are making their careers in newspaper circulation, the "employees" for whom Congress legislated collective bargaining rights.

The last decision of the Sixth Circuit declared this absurdity and discerned the error that let to it but was unable to correct it for reasons that do not limit this Court.

> The law of the case requires that we accept the Board's determination that the newspaper carriers are employees. See, e.g., *Hawkes v. Internal Revenue Service,* 507 F.2d 481, 481 n.1 (6th Cir. 1974). *Nonetheless, we feel compelled to note our disagreement with this decision.* It is difficult to imagine that twelve year old children working five hoiurs a week for two dollars an hour, are the type of people to whom Congress intended to extend the protection of the National Labor Relations Act. It is even more difficult to imagine that such a group would, or even should, ever organize. To us, these children are much like the sheltered workshop people in *Key Opportunities, Inc.,* 265 NLRB No. 178 (1982), and the part-time student janitors in *San Francisco Art Institute,* 226 NLRB 1251 (1971), whom the Board has already determined are not employees for purposes of the Act. The only practical effect of this decision is to exclude from the Act a group of employees [the district managers] whom Congress surely intended would be covered by it.
>
> *Newspaper Drivers & Handlers Local No. 372 v. NLRB,* 735 F.2d 969, 970 n.** (6th Cir. 1984) (App. 3-4) [emphasis added].

The primary source of this error was the Sixth Circuit's initial ruling, apparently prompted by a misreading of this Court's decision in *United Insurance*[2] and at war with this Court's *Bell Aerospace*[3] and *Hendricks County*[4] decisions, that the Board could not hold workers implicitly excluded from statutory employee status on legislative purpose or policy grounds. As a result, on remand, a divided Board departed from its long-

---

[2] *NLRB v. United Insurance Co.,* 390 U.S. 254 (1968).

[3] *NLRB v. Bell Aerospace Co.,* 416 U.S. 267 (1974).

[4] *NLRB v. Hendricks County Rural Electric Membership Corporation,* 454 U.S. 170 (1981).

standing previous policy of holding the newspaper to its past characterization of carriers as non-employees and, reversing its initial decision, held the district managers to be supervisors.

1. This Court's Holding In *United Insurance* Does Not Preclude The Implicit Exclusion Of The Carriers From The Purview of §2(3) On The Basis Of Legislative Purpose.

In rejecting the Board's initial decision and order in this case, the first panel of the Sixth Circuit concluded that the ALJ's determination that "as a matter of policy" the carriers should not be treated as employees was erroneous.

> The determinative factor with respect to this issue is whether the paper carriers are employees of Oakland or are independent contractors.
>
> * * *
>
> We cannot accept the finding that, as a matter of policy, they are not employees. Whose policy? They are entitled to be definitely classified under the statute. Either they are legally employees or, according to law, they are not employees.
>
> We remand the case to the Board for determination of the legal status of these paper boys with reference to their employment relationship to Oakland.
>
> *Oakland Press Co. v. NLRB,* 606 F.2d 689, 692-693 (6th Cir. 1979) (App. 14).

On remand, the Board cast the issue to be resolved in the case as narrowly—whether the news carriers were independent contractors or employees under the Act. In resolving this issue, the Board looked only to right-to-control considerations, giving little or no weight to other relevant if not dispositive factors such as the employer's prior characterization of the carrier relationship and statutory purposes. (App. 45-47).

The conclusion of the Board and the court of appeals that the carriers must be either employees or independent contractors is a false dichotomy. It assumes that there are no *implicit* exclusions to the term "employee" as set out under §2(3) of the Act, and that assumption conflicts with several controlling decisions of this Court holding that certain categories of workers are *implicitly* excluded from statutory employee status on policy grounds. *See NLRB v. Bell Aerospace Company,* 416 U.S. 267 (1974) [sustaining Board policy to exclude managerial personnel from statutory employee status because not within legislative purpose]; *See also NLRB v. Hendricks County Rural Electric Membership Corp.,* 454 U.S. 170 (1981) [upholding Board policy to exclude "confidential employees" having a "labor-nexus" from statutory definition of employee for policy reasons].

The result here also ignores recent decisions by the Board itself which indicate that the employee versus independent contractor polarity is unduly simplistic. Under the rationale of these cases the carriers need not fit neatly into one category or the other. See *Key Opportunities, Inc.,* 265 NLRB 1371 (1982) [where, although the employer operated a sheltered workshop for the handicapped who worked for wages under the direct charge of Key personnel at tasks similar to those performed by admitted employees and who were subject to discipline, including discharge by Key, the Board held Key's handicapped workers not to be §2(3) employees by reference to the statutory purposes although "no doubt 'employees in the generic sense of the term' " and not explicitly excluded by the Act; accordingly Key's workers who oversee them are not §2(11) supervisors]; *Firmat Mfg. Corp.,* 255 NLRB 1213 (1981) [where a high school cooperative education student hired as an apprentice to work part time during the school year, full time during the summer, with steady employment upon graduation, was held not an employee for purposes of the Act]; *San Francisco Art Institute,* 226 NLRB 1251 (1976) [where the Board ruled ineligible for col-

lective bargaining student janitors with high turnover and brief tenure who received less pay than regular janitors and worked only 20 hours a week to accomodate their school commitments][5]; *Cedars-Sinai Medical Center,* 223 NLRB 251 (1976) [where the Board held hospital interns and residents implicitly excluded from the Act's definition of employee].

The basis for the Board's assumption that the carriers could not be implicitly excluded from the Act on policy grounds appears to be a misreading by the Sixth Circuit's first panel of this Court's holding in *United Insurance.*[6] There, this Court concluded that it was Congress' purpose to have the Board and courts apply general agency principles (the right-to-control test) when distinguishing between the terms "employee" and "independent contractor" under the Act.

---

[5] In *San Francisco Art Institute* the agency's rationale emphasized factors that are clearly present in this case.

> "We are influenced in our decision chiefly by the brief nature of the student's employment tenure, by the nature of compensation for some of the students, and by the fact that students are concerned primarily with their studies rather than with their part time employment. In our view, the student janitors are best likened to temporary or casual employees, whose certification would present unusually vexsome problems."
>
> *Id.* at 1251.

[6] Although not specifically cited by the Board or the Sixth Circuit in the proceedings below, it appears that *United Insurance* is the source of this false dichotomy and the resultant simplistic application of the right-to-control test. In its main brief to the first panel of the Sixth Circuit, the Company principally argued that every worker was an employee under §2(3) unless specifically covered by one of the explicit exclusions in the section (that is, for purposes of this case, the carriers were either employees or excluded as independent contractors), and that employment status could not be based on "economic and policy considerations" but rather solely on the common-law agency (right-to-control) test. *United Insurance* is prominently cited as authority for each of the Company's arguments.

In setting out this standard, the Court stated:

> Initially this Court held in *NLRB v. Hearst Publications,* 322 U.S. 111, 88 L.Ed 1170, 64 S.Ct. 851, that "whether...the term 'employee' includes [particular] workers...must be answered primarily from the history, terms and purposes of the legislation." 322 U.S. at 124, 88 L.Ed at 1181. Thus the standard was one of economic and policy considerations within the labor field. Congressional reaction to this construction of the Act was adverse and Congress passed an amendment specifically excluding "any individual having the status of an independent contractor" from the definition of "employee" contained in §2(3) of the Act. The obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act.
>
> *Id.* at 256. (footnote omitted)

This language appears to be the basis for the Sixth Circuit's and the Board's conclusion that the carriers could not be implicitly excluded from the Act for reasons of legislative purpose and policy but that they were excluded only if determined to be independent contractors after exclusive application of the right-to-control test. While the Court in *United Insurance* was confronted with the issue of whether certain workers were employees or independent contractors under the Act and did apply common law principles of agency to resolve that issue, the case does not hold that a rigid employee - independent contractor dichotomy must be Procrusteanly applied to all cases involving the question of employee status or independent contractorship under §2(3), thereby precluding the Board or the courts from finding any *implicit* exclusion from the statutory definition; it was surely not the intent of *United Insurance* to require an exclusive application of the right-to-control test at the expense of all statutory policy and purpose considerations. *Bell Aerospace* and *Hendricks County* certainly teach otherwise.

In *United Insurance,* this Court was not confronted with a situation like that in this case. There, the Court was faced solely with the issue of whether a previously unorganized group of workers (debit agents) were employees or independent contractors under the Act. Thus, unlike this case, there was no additional basis for excluding the debit agents from employment status in *United Insurance.* Moreover, the continued existence of an established collective bargaining relationship and its attendant rights and benefits was not in the balance. In addition, the employment relationship of only one group of workers vis-a-vis the company was involved. Under these circumstances the single-minded application of the right-to-control test was appropriate. A much different analysis would have been required, however, had resolution of the debit agents' employment status impacted on the status of another group of workers, if additional considerations appeared to warrant their exclusion from statutory employment status, and if that group was party to an established collective bargaining relationship with the employer founded upon its characterization of the relationship with the other group.

In fact that is the factual scenario involved in this case. Here, even if not independent contractors there are additional grounds to exclude the carriers from employment status. And here determination of the employment status of the newspaper carriers is of fundamental importance only with respect to determining whether *another* group of employees, the district managers, are entitled to *continued* protection under the Act.

The carriers' employment status, for purposes of determining their rights under the Act, is not, by itself, of any significance. In fact, as the third panel of the Sixth Circuit noted, the carriers themselves are not directly involved in the determination as to whether they are employees or independent contractors; their status is only collaterally in question here. More importantly, the origins of the district managers' current employment status is intertwined with the company's past characterization of the

carriers as independent contractors; the collective bargaining relationship that has developed between the district managers and the company is based on the Company's prior consistent representation that the managers, not the carriers, were employees. The ALJ recognized this when he found that:

> From the record as a whole it is clear that the Respondent's [Company's] contention that these carriers are employees is taken for the purpose of this case only. (A- 26).

To reject the established collective bargaining rights of *the district managers,* as the Court of appeals and the Board ultimately did here, solely on the basis of a sterile application of the right-to-control test to *the newspaper carriers,* without any consideration of the circumstances which led to the formation and continuation of that collective bargaining relationship, is absurd. Such could surely not have been the intended scope of the holding in *United Insurance.*

Congress could hardly have intended, when it amended § 2(3) to exclude independent contractors, that the continued existence of established collective bargaining rights for one group of employees could be entirely dependent on the application, to an entirely separate group of workers, of a legal test (right-to-control) that evolved to determine whether a newspaper was liable in tort to third parties or for taxes, insurance or other statutory liability. Rather, in adding the independent contractor exclusion in 1947, Congress indicated that the Board had exceeded the standards and intent of the original Act by including independent contractors as employees in several cases. H.R. Rep. No. 245, 80th Cong., 1st Sess. 18 (1947). From time to time the Board had used the common law concept of independent contractor in determining whether an individual or group fell within the meaning of employee, placing prime emphasis on the employer's power of control. However, in *NLRB v. Hearst Publications,* 322 U.S. 111 (1944), the Board, with this Court's approval, departed from conventional (ordinary) definitions of "employee" and "independent contractor." In *Hearst,* the

Supreme Court affirmed the Board's determination that "news boys" were "employees" for purposes of collective bargaining. The House Committee report which accompanied the 1947 amendments contained specific criticism of the *Hearst* decision:

> An "employee", according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire. But in the [Hearst] case...the Board expanded the definition of the term "employee".... "Employees" work for wages or salaries under direct supervision. "Independent contractors" undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods...and labor and what they receive for the end result, that is, upon profits.
>
> H.R. Rep. No. 245, 80th Cong. 1st Sess. 18 (1947).

However, even though the "independent contractor" exclusion constituted a specific repudiation of the result in *Hearst*, this Court has subsequently determined that it did not represent a total rejection of the *Hearst* approach. *See Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 168 (1971). Thus, while it is true that general agency principles must be considered when drawing the line between employees and independent contractors, one need resort additionally to economic and policy considerations to infuse § 2(3) with meaning. *Id.* at 168. The federal courts have in particular considered the undesirability of denying employee status under § 2(3) where this would contravene the stated purposes of the Act by disrupting a well established collective bargaining relationship. *See, e.g., Ace Doran Hauling & Rigging Co. v. NLRB*, 462 F.2d 190, 194 (6th Cir. 1972).

2. The Sixth Circuit's Initial Decision Improperly Barred The Board From Applying Established Precedent Dictated By Important Considerations Of Industrial Stability To The Issues Here.

In its initial decision the Board applied its well established *Newsday* doctrine in rejecting the Company's contention that its carriers were actually employees. The Sixth Circuit's first panel, based on a misreading of *United Insurance,* rejected the Board's tradional theory and remanded for a plenary determination of the carriers' status under the common law right to control test. Under its view of the contraints of the remand the agency departed from over thirty years of precedent and undertook a full-scale inquiry into whether a *collateral* group of workers were, on balance, independent contractors as the Company had consistently held them out to be or actually employees, contrary to its past characterization of the relationship. In forcing the Board to jettison thirty years of precedent to the contrary, the Sixth Circuits' first panel opened Pandora's box and set loose the mischief discerned by the third panel.

The agency's *Newsday* line of cases barred a newspaper from making the *ad hoc* contention that a collateral group of carriers were not actually independent contractors despite their past treatment and characterization as such in order to defeat unionization of the district managers. Obvious equitable and administrative considerations support this policy. See *Newday, Inc.* 171 NLRB 1456 (1968) [publisher "concedes it has always considered the carriers to be independent contractors. We accordingly find that the carriers are not employees"]; *Suburban Newspaper Group,* 195 NLRB 438 (1972) [record fails to establish that carriers are employees and not independent contractors "as the Employer holds out to the public"]; *Eureka Newspapers, Inc.,* 154 NLRB 1181, 1185 (1965); *Buffalo Courier Express, Inc.,* 129 NLRB 932, 937 (1960); *San Antonio Light,* 130 NLRB 619, 629 (1961); *Kansas City Star Co.,* 76 NLRB 384 (1948) [legislative history of 1947 amendment dic-

tates that the Board recognize as "employees" only those who work for wages or salaries under direct supervision].

These cases arose in an organizing context. If the employer's prior characterization of the employment status was of significance in that situation then it is a *fortiori* of more importance in the context of an *established* collective bargaining relationship where attendant rights and benefits are in the balance. Surely, if the doctrine bars plenary litigation of the status of a collateral group when the bargaining relationship is established it will be barred thereafter as well. The ALJ recognized the significance of the Board's traditional view of the law.

> ... The questions here is not so much whether a twelve year old who delivers newspapers one hour a day on a skate board is an entrepreneur, but whether as a matter of policy they (or the adults) should be treated as employees.
>
> Though the factors cited by the parties do have some bearing on whether one is found to be an independent contractor or not, there are additional, and important, considerations here.
>
> Specifically, the Respondent [Company] has always treated the carriers as non-employees, and still does. (App. 25-26)

When he held the Company to its past characterization of carrier status as non-employment he correctly applied established Board law. This policy-based line of authority is comparable to the "managerial" and "confidential" employee exceptions found acceptable on grounds of statutory purpose in *Bell Aerospace* and *Hendricks County.*

However, in its subsequent decisions the Board inexplicably reversed this long-standing policy of holding an employer to its prior characterization of collateral employee status. This change of directions seems to have two origins: 1) the Board's misreading of the *United Insurance* holding so as to preclude

consideration of statutory purpose and policy; and 2) a change in its membership. The previous section refuted the first source of error. An examination of the second follows:

The second panel of the Sixth Circuit noted that the "logic of this [the Board's] reversal appears to be entirely related to change in composition of the Board, since the following facts relied upon by the Board in its decision were all available at the time of the *Newsday* decision." *See Newspaper Drivers & Handlers Local No. 372 v. National Labor Relations Board,* 682 F.2d 116, 117 (6th Cir. 1982) (per curiam). (App. 16) While the Board has broad discretionary powers to carry out its responsibilities under the Act, such authority cannot be construed to permit *ad hoc* and blatantly inconsistent and contradictory judgments where the only determinative element seems to be the composition of the panel which happened to hear the case. The Board has no authority to treat similar situations dissimilarly; it has an obligation to make *principled* decisions—to follow, distinguish or overrule its own precedent. *Seafarers Local 777 v. NLRB,* 603 F.2d 862, 869-72 (D.C. Cir. 1979).[7]

---

[7] The unexplained about-face taken by the Board in this case is apparently not limited to circumstances involving news carriers. In *Seafarers Local,* the court examined in depth the course of the Board's decisions concerning whether cab drivers were employes or independent contractors under the Act. After examining the changing standards and conflicting decisions of the Board in this area, the court stated:

> Not only has the NLRB repeatedly reached diametrically opposite conclusions on the basis of virtually identical fact situations, but moreover it has done so in a series of opinions which typically offer no explanation for their result other than a recitation of the pertinent facts.
>
> *Id.* at 869 (citations omitted).

The Board majority in its supplemental decisions did not bother to mention, let alone distinguish or overrule the numerous cases in the past wherein it had held newspaper carriers not to be employees. Similarly, while in its original decision the Board gave substantial weight to the employer's characterization of the carriers as independent contractors, in its subsequent decisions it gave no weight to this factor at all.[4] This refusal to place any weight on prior characterization of the employment relationship has no other result than to exclude from the protection of the Act employees, district managers, who for the previous six years, had been classified as employees for purposes of collective bargaining despite the absence of any operational changes in their jobs.

As such, the Board's unexplained reversal of its prior precedent makes a mockery of the policies and purposes behind the Act. If the rights and protections provided under a collective bargaining agreement can be destroyed for no apparent reason other than that the Board changes its mind or politics, then the Act's purpose of establishing and stabilizing collective bargaining relationships is not promoted but inhibited.

---

[4] The Board's simple notation, in its supplemental decision, that its refusal to consider this factor is consistent with *recent* Board decisions (citing *Philadelphia Newspapers, Inc.*, 238 NLRB 835 (1978) and *The Virginian Pilot/Ledger Star, Capital Division of Landmark Communications, Inc.*, 241 NLRB No. 81 (1979)) does little to rebut the charge here that the Board had engaged in erratic and unreasoned decision making. In addition, the cases cited by the Board provide little solace to the district managers whose collective bargaining relationship has still been destroyed because of the Board's unexplained refusal to consider the Company's prior characterization of the carrier's employment status. As the dates of these decisions indicate, the Board's change in posture occurred substantially later than the formation of the district manager's collective bargaining agreement with the Company. At the time of that formation Board law still held that carriers were not employees.

B. Because The Rulings Below Threaten Industrial Stability By Permitting Virtually Any Newspaper Whose Circulation District Managers Have Union Representation To Put At Risk Or Hold Hostage The Collective Bargaining Relationship, Special And Important Reasons Warrant Grant Of The Writ In This Case.

It is a basic objective of the Act to encourage and promote stable collective bargaining relationships as an alternative to industrial strife. Employee status is the foundation of the collective bargaining relationship as well as of many of the Act's protections. Supervisors have no right to collective bargaining representation. Section 14(a) of the Act, 29 U.S.C. §164(a), merely permits collective bargaining on their behalf if the employer is willing. No employer can be compelled to establish or continue the relationship.[9]

To permit an employer with an established bargaining relationship to refuse to bargain by challenging employee status is surely as disruptive of industrial stability as permitting an employer to refuse to negotiate by questioning the union's majority status.[10] Indeed, it is far worse since only protracted litigation rather than a prompt election can resolve it. When employee status under an established bargaining relationship is challenged, pension and other rights under plans jointly administered by unions and employers may be irreparably lost along with the collective bargaining unit.[11] Even an employer's

---

[9] *NLRB v. News Syndicate Co.*, 365 U.S. 695 (1961); *Beasley v. Food Fair, Inc.*, 416 U.S. 653 (1974).

[10] *See Ray Brooks v. NLRB*, 348 U.S. 96, 104 (1954); and *United States Gypsum Co.*, 157 NLRB 652 (1966).

[11] Federal law does not require that pension rights vest until participants have ten years of service. Employee Retirement Income Security Act, 29 U.S.C. §1053. All district managers had less than ten years of participation in the jointly administered plan here because it had first been negotiated less than ten years before the events in question.

threat to raise the issue before the Board and argue against employee status for district managers will have an important and unsettling impact on negotiations. Thus the disruptive effects of the rulings below on industrial stability are several and serious.

The threat to industrial peace presented by the decisions below is extensive as well. Petitioner represents hundreds of district managers at both of the major Detroit area daily newspapers. Other unions represent district manager classifications at newspapers in other cities. The rulings below threaten the existence of most of those units because they accept an *ad hoc* claim that carriers long treated as independent contractors are actually employees and hence that those who recruit and oversee them are supervisors without statutory collective bargaining rights. It is no answer to say employees and independent contractors are well-established and legally discrete categories. Since the newspaper has control over carrier *modus operandi* as well as the presentation of the most probative overall evidence concerning it, and the narrow right to control test as applied by the Board calls for the delicate weighing of many variables, the employer is in a position to tilt the balance of factors one way or the other, and even one day to another, as its interest may dictate. Unless the employer is held to or substantial weight given its prior characterization of the carrier relationship, a newspaper can contend today that carriers are employees to defeat or destroy district managers bargaining rights, but tomorrow, if a carrier dies in an accident, breaks a window throwing a paper, or signs a union authorization card, argue that they are independent contractors.

Unitl the rulings below, reviewing courts and the Board itself have refused to permit newspapers to play fast and loose with their own workers in this fashion, and in particular where the effect of the ploy is to destroy an established collective bargaining unit. Legitimate management prerogatives do not warrant the decisions below. No intervening operational changes were

shown, or even claimed, to justify the Company's contention that the carrier relationship it had created and controlled and that it had held out to the public, to its own employees and to their union to be an independent contractorship, was sham. Because the source of this error and the substantial mischief which it permits is an apparent misreading of this Court's holding in *United Insurance,* the decisions below should now be reviewed here.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

GERRY M. MILLER
788 North Jefferson Street
Milwaukee, Wisconsin 53202
414/271-4500
Attorney for Petitioner

Of Counsel:
LARRY R. STEFFES
Goldberg, Previant, Uelmen, Gratz,
Miller & Brueggeman, s.c.
788 North Jefferson Street
Box 92099
Milwaukee, Wisconsin 53202
414/271-4500